IN THE

Supreme Court of the United States

October Term, 1940.

No. 350.

ALBERT M. LIEBERMAN, EMIL COHN, JR., and GEORGE F. McCANN, Ancillary Receivers of CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a Corporation,

Petitioners,

against

CITY OF PHILADELPHIA,

Respondent.

Petitioner's Brief Replying to Respondent's Brief Opposing Issuance of Writ of Certiorari.

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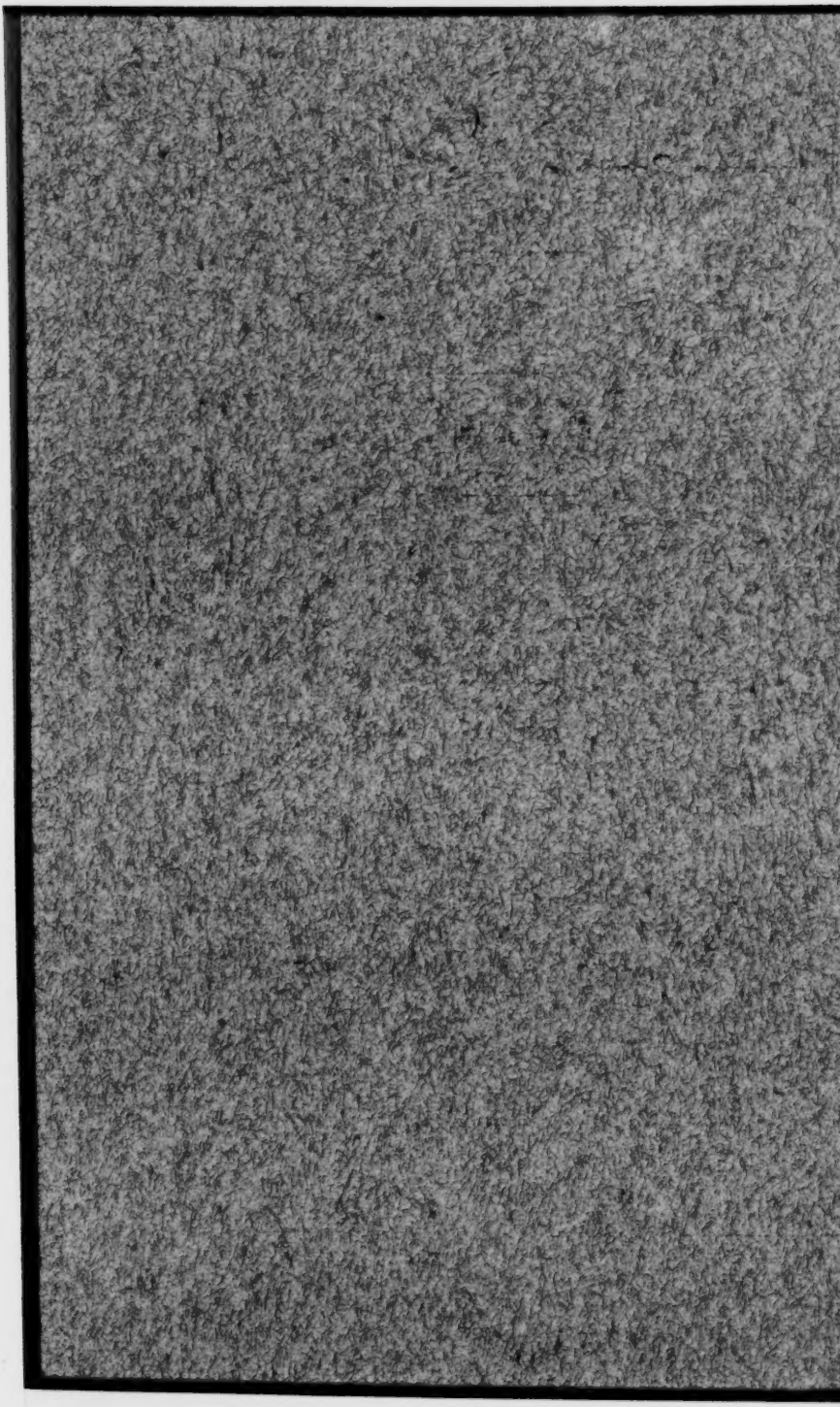

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PETITIONERS' BRIEF REPLYING TO RESPONDENT'S BRIEF OPPOSING ISSUANCE OF WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners believe that Respondent's brief merits this brief memorandum in reply.

I. JURISDICTION.

Petitioners contend that adequate grounds for the application for the issuance of a writ of certiorari are provided in this case by the clear conflict on identical facts between the decision of the Fifth Circuit in **National Surety Co. of N. Y. vs Cobb, 66 F. (2d) 323 (CCA 5 1933)** and that of the Third Circuit in the case at bar. The principle involved is that where a foreign corporation is dissolved at

the domicile, in the absence of a public policy to the contrary in states *other* than the domicile, no suit can be brought, nor personal judgment obtained, against the dissolved corporation in any other state where it may be licensed to do business.

In **Clark vs Williard, 292 U. S. 112, 78 L. Ed. 1160, 54 Sup. Ct. Rep. 615 (1934)**, the principle just mentioned underlay this Court's determination. This is clearly indicated in what was declared and done. Because there was no evidence of what the public policy of Montana might be in such cases, the action was sent back to Montana in order that the highest court of that state might speak on the subject. But this Court took pains to add that its conclusion was **not** at war with cases such as **National Surety Company vs Cobb, supra,** which decision this Court specifically mentioned.

Respondent quotes a line from the decision to the effect that the judgment obtained below in Montana "is at least effectual to liquidate the claim as a charge upon the local assets". Of course Justice Cardozo was speaking of a case begun against a foreign corporation *before dissolution* in states where the public policy might be to the contrary of that established in New York and Pennsylvania. He could not have referred to the prosecution of a suit in the face of a decree enjoining such action, such as a decree present at bar. Moreover, Petitioners have never contended that the securities which are the subject of this cause should be placed in the hands of the officers of the District Court otherwise than subject to the claims of Respondent under the contract, if any. Petitioners' whole case is predicated on the proposition that the Court's officers should have custody, subject to the agreement, **because Respondent cannot obtain a judgment.**

Respondent's efforts to obviate the effect of the decision of the Fifth Circuit in **National Surety Company vs Cobb, supra,** cannot be understood in the light of that Court's crystal-clear language.

The conclusion of the sentence quoted from that case, the commencement of which is copied on page 2 of Respondent's brief, is a statement of the principle for which Petitioners have cited the case. An effort is made by Respondent to cause this Court to believe that changes in the General Corporation Law of New York *since the decree of dissolution of the National Surety Company* would limit the decision of the Fifth Circuit in that case to other cases involving insurance companies dissolved *prior* to the amendment of 1932 to the New York General Corporation Law. But the Court in the case under discussion did not base its conclusion on the General Corporation Law but upon the Insurance Code, holding that the General Corporation Law did not apply to an insurance company, and this because Section 6 of the General Corporation Act provides that where in conflict with any other general corporation law, the General Corporation Law shall not apply.

Section 6 of the General Corporation Act of New York is still in effect. As recently as May 28, 1940 the Court of Appeals of the State of New York in **In Re National Surety Co., 27 N. E. (2d) 505** came to a conclusion identical to that reached by the Fifth Circuit in **National Surety Co. of N. Y. vs Cobb, supra.** The Court of Appeals case involved a surety company dissolved in New York in *1934.* The decision was that a judgment obtained after dissolution in Mississippi in an action against the statutory receiver of National Surety Company was void and of no effect because of the terms of the insurance law of New York relied on by

the Fifth Circuit Court in **National Surety Company of New York vs Cobb, supra.** It can hardly be argued now that the General Corporation Law of New York has any bearing upon the matter now under dispute.

It is also beyond argument that the law of Pennsylvania is similar **(Burns vs Niagara Life Insurance Co., 279 Pa. 453, 124 A. 128, 1924).** Consequently, there does not exist a "public policy" in Pennsylvania at war with the principle established in all the cases hereinabove cited. Because of such decisions, the jurisdictional element, a sharp conflict between the decisions of two circuit courts, is clearly present.

II. COMMENT ON SOME OF RESPONDENT'S STATEMENTS AS TO THE FACTS.

It is unfortunate that the facts in this matter should be the subject of any argument. However, as it is believed that they have not been correctly stated by Respondent, additional comments seem appropriate.

On page 3 of Respondent's brief reference is made to two proceedings instituted by Trevose Construction Company involving the parties now before this Court, one of which was instituted in Court of Common Pleas No. 3 of Philadelphia County as of June Term, 1932, No. 13,471. The other was instituted in Court of Common Pleas No. 4 of Philadelphia County as of December Term, 1935, No. 2064. Respondent states that in both cases judgments were entered against Petitioners and that Petitioners "permitted" such judgments. On page 9 of Respondent's brief it is again stated that proceedings were instituted and pursued to judgment "long after" the dissolution of Consolidated. These statements do not convey the correct impression.

The suit in Court of Common Pleas No. 3 was instituted by Trevose Construction Company long *before* dissolution, as the term of the proceedings indicates. It is true that a consent decree was entered with the permission of the District Court and of Petitioners in Court of Common Pleas No. 3 of Philadelphia County *after* dissolution of Consolidated in New York. It is not true, as the reference on page 9 of Respondent's brief might indicate, that this action was *instituted* after dissolution.

The statements relative to the proceedings in Court of Common Pleas No. 4 convey another erroneous impression. Petitioners were defendants in that action and vigorously opposed Trevose Construction Company in its effort to obtain a judgment. The judgment then obtained was appealed by Respondent, and then the matter was settled by the domiciliary receiver.

It is unfortunate that in its "Summary Statement of the Matter Involved" on page 5 and in its argument on page 10 Respondent mentions two suits which, at the time of the meetings before the Master, had been instituted against Respondent, which suits arose out of the contracts of contractors for whom Consolidated was surety. The impression is given by Respondent that these two suits are *still* pending and undetermined. On page 7 of the Petition for Writ of Certiorari, it is explained that one of these suits was discontinued October 21, 1938 and the other non-prossed by Respondent itself on January 29, 1940.

At the time of the argument before the District Court on Respondent's exceptions to the Master's Report, the District Court was handed an exemplification showing that of these two actions, one, the Siebner case, had been discontinued October 21, 1938. This exemplification was not

placed by the District Court in the record, nor did Respondent include it in printing the record for the Circuit Court. Nor has it ever introduced into these proceedings the undisputed fact that the other action—the Barag suit—was nonprossed by Respondent itself as recently as January 29, 1940.

Respondent also refers on page 5 to the Master's finding that the City of Philadelphia held outstanding obligations (not reduced to judgment) against Consolidated in the amount of $1839.11 representing money paid in repairing defective work performed under certain paving contracts on which Consolidated was surety. The City does not add the fact appearing on page 7 of the Petition for Writ of Certiorari that with the consent of Petitioners under order of the District Court this amount was long since paid to Respondent.

Lastly, Respondent on page 14 invites this Court's attention to a roofing contract (R. pp. 117-20), referred to also on R. p. 113 and R. p. 224, in an effort to cause this Court to infer that a fifteen year guarantee by the contractor bonded by Consolidated is still in effect. Petitioners have already pointed out in Footnote B on page 7 of their Petition for a Writ of Certiorari that this fifteen year guarantee was to be that of the manufacturer of the roofing material, not the contractor building the roof. Mention is made of this small item to avoid false impressions.

For the reasons set forth in the foregoing section of this Reply it is confidently reiterated that the question of whether there are now any "outstanding obligations" of Consolidated to Respondent is confined only to Respondent's claim that completion or performance contracts long since executed should be construed so as to include a term of permanent indemnity on the part of the contractor.

III. CONCLUSION.

Respondent's brief concludes with an *ad hominem* argument as to the City's vital interest in this case and the large amounts paid surety companies for premiums. A plea is also made for the sanctity of contracts. Petitioners choose to rest their argument upon the law, but it might well be said that surety companies and contractors the country over are also vitally interested in the outcome of this case. They are desirous of hearing from this Court whether contracts entered into as ordinary performance contracts are going to be construed as obligations for permanent indemnity. If the decision of the Circuit Court stands, thousands of contracts similar to that here involved will be given an interpretation novel in building law.

Respectfully submitted,

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